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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Sections 12 and 19 )  
of the Cable Television Consumer )  
Protection and Competition Act of 1992 )

MM Docket No. 92-265

Development of Competition and )  
Diversity in Video Programming )  
Distribution and Carriage )

To: The Commission

COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

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To: The Commission

COMMENTS OF RAINBOW PROGRAMMING HOLDINGS, INC.

Rainbow Programming Holdings, Inc. ("Rainbow"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rule Making ("Notice")<sup>1/</sup> in the above-captioned proceeding.

Rainbow, a wholly-owned subsidiary of Cablevision Systems Corporation ("Cablevision"), is the managing general partner of several partnerships that provide national and regional programming available to approximately 80,000,000 subscribers collectively.<sup>2/</sup> Each of these programming services, which include American Movie Classics, Bravo, and eight regional sports services, is organized as a separate partnership with its own

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<sup>1/</sup>In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265, FCC-92-543 (rel. Dec. 24, 1992).

<sup>2/</sup>Subsidiaries of the National Broadcasting Company are general partners in each of the partnerships; subsidiaries of Liberty Media, Inc., a multiple system operator with interests in several other programming services, are general partners in American Movie Classics and several of the regional sports services.

general manager and sales, marketing, programming, and production staffs.<sup>3/</sup>

### **Introduction and Summary**

Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "Act")<sup>4/</sup> is intended as a limited intrusion into the video programming distribution market. As a general matter, that market should continue to function free of government interference. Rainbow strongly supports the Commission's proposed two-part test for identifying violations of the program access provisions of the Act. The Commission should not interfere with arm's-length negotiations between programming vendors and distributors unless the "purpose or effect" of the price or terms demanded by the programming vendor significantly hinder the distributor from providing programming to consumers. The rates, terms, and conditions negotiated by programming vendors and multichannel video programming distributors should be presumed lawful.

The Commission should broadly construe the statutory authority of programming vendors to impose requirements for the "offering of service" to permit the continued imposition of reasonable performance standards. This will enable programmers

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<sup>3/</sup>Rainbow provides legal, accounting, human resources, and other support services for all of the partnerships.

<sup>4/</sup>Pub. L. No. 102-385, 106 Stat. 1460, 1494 (1992). Section 19 of the Act is codified as Section 628 of the Communications Act, 47 U.S.C. § 548.

to ensure that distributors make an appropriate commitment to the marketing and distribution of the programming service.

Situations in which a programming vendor would not be subject to the undue influence of a cable operator should be excluded from the reach of the program access provisions. A cable operator's interest in a programming vendor should be deemed "non-attributable" if the operator serves fewer than ten percent of all cable subscribers nationwide and an unaffiliated non-cable operator holds at least a twenty percent ownership interest in the vendor. The cable operator in that situation would have a fiduciary duty to its partner to increase, rather than to inhibit, the sale of programming. With such a relatively small share of the video distribution market, moreover, the operator would have an economic incentive to see its affiliated programming vendor *expand* audience reach through the use of all available distribution channels.

A cable operator should not be deemed to hold an attributable interest in a programming vendor in any geographic area in which the operator does not provide cable service, or in any vendor whose service is carried by multichannel video programming distributors that serve fewer than one-third of all households in the geographic area in which service is available. To foster programming diversity, exclusive distribution contracts of up to five years for new services should be deemed to satisfy the statute's public interest test. Exclusive contracts should also be permitted in connection with services carried by

multichannel video programming distributors that serve fewer than one-third of all households in the geographic area in which service is available.

Given the absence of legislative intent to subject existing distribution arrangements to the program access provisions of the Act (other than as to exclusivity), the Commission should apply the ownership access provisions prospectively. In devising enforcement procedures to consider future violations of the Act, the Commission should limit the type and scope of pleadings and discovery so that mere speculative allegations of misconduct do not trigger a significant expenditure of private and public resources in an adjudicatory proceeding.

**I.    The Program Access Provisions of the Act Establish The Public's Basic Right of Access to Programming, But Leave the Price and Terms of Access to the Marketplace**

**A.    So Long As The Public Has Access To Programming, The Commission Should Not Interfere With Program Distribution Agreements Negotiated at Arm's Length**

In enacting the 1992 Cable Act, Congress intended to "rely on the marketplace, to the maximum extent feasible," to promote the availability of diverse views and information.<sup>5/</sup> Congress recognized the benefits of competition,<sup>6/</sup> and provided for regulation only to the extent competition does not fully exist. The program access provisions are intended to ensure that the

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<sup>5/</sup>1992 Cable Act, § 2(b)(1)-(2).

<sup>6/</sup>See, e.g., 138 Cong. Rec. H6543 (daily ed. July 23, 1992) (statement of Rep. Thomas); id. at H6534 (statement of Rep. Tauzin).

public has access to programming from multiple distributors of video programming.

As long as consumers have access to programming, however, Congress intended to permit programming vendors and distributors to engage in arm's length negotiations to determine the price and terms of distribution.<sup>7/</sup> Bravo, American Movie Classics, and the regional SportsChannel services are offered to all programming distributors regardless of the technology employed.<sup>8/</sup> The price and terms of distribution vary from distributor to distributor (including distributors using the same technology), depending upon the specific characteristics and circumstances of each distributor. In no case, however, have the price or terms "significantly hindered" a distributor from providing these services to subscribers.

Rainbow strongly supports the proposed two-part test for determining compliance with the Act's program access requirements.<sup>9/</sup> Absent a determination that an act or practice

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<sup>7/</sup>See, e.g., 138 Cong. Rec. H6541 (statement of Rep. Harris) ("[The program access requirement] does not set th[e] prices, terms or conditions at [sic] its detractors claim, but rather encourages good faith negotiations.").

<sup>8/</sup>Because the SportsChannel services are available on the Universal Tier Bit, a home dish user whose decoder is authorized to receive any other service can receive the SportsChannel service.

<sup>9/</sup>Under the proposed test, an aggrieved multichannel video programming distributor must prove (i) that a vendor or operator's particular practice was "unfair," "deceptive," or "discriminatory" and (ii) that the practice "significantly hinder[ed]" the multichannel video programming distributor from providing programming to consumers. Notice at ¶ 10.

has effectively precluded the offering of service to the public, the Commission should permit the video distribution market to function unimpeded.

**B. The Commission's Definition of "Discrimination" Should Sanction Reasonable Cost- and Market-Based Price Differences**

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In defining the scope of access to which program distributors are entitled under the Act, the Commission's rules must recognize that price differences do not necessarily amount to price discrimination.<sup>10/</sup> The Act specifically permits programming vendors to offer price differentials that take into account costs and other economic factors, and to impose reasonable requirements related to the offering of service by programming distributors.<sup>11/</sup> The Commission should establish a strong presumption that differential prices, terms, and conditions established by the vendor are lawful.

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<sup>10/</sup>Because they target speech-related acts and practices of "a satellite cable programming vendor in which a cable operator has an attributable interest," *see, e.g.,* 47 U.S.C. § 548(b), (c)(2) (emphasis supplied), the program access provisions are very likely invalid under the U.S. Constitution as a denial of Equal Protection. U.S. Const. amends. I, V; *see, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 487, 496 (1986) (requiring heightened scrutiny of a statute imposing unequal restraints on the exercise of First Amendment rights). At the very least, the provisions cannot be enforced in a way that prevents a vertically-integrated programming vendor from engaging in acts and practices undertaken by non-integrated programmers. If vertically integrated and non-integrated programming vendors offer comparable price differentials, for instance, those practices should not constitute discrimination under the Act.

<sup>11/</sup>47 U.S.C. § 548(c)(2)(B)(i)-(iii).

A programming vendor may establish different prices for different multichannel distributors to take into account not only the costs incurred by the vendor in connection with the creation, sale, delivery or transmission of programming, but also "costs incurred at the . . . distributor's level."<sup>12/</sup> Cable operators, for instance, must make substantial capital investments in their facilities and incur substantial marketing and advertising costs, copyright payments, franchise fees, maintenance and technical costs, and other expenses that competing multichannel distributors do not bear. Cable operators also maintain sophisticated customer service operations and, far more than other multichannel distributors, actively attempt to police theft-of-service.<sup>13/</sup> Given these expenditures and services, which benefit the programmer as well as the cable operator, operators legitimately demand and receive a price for programming relatively lower than the price charged to other distributors. To be required to offer programming at the same price to distributors such as home satellite dish ("HSD")

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<sup>12/</sup>See 138 Cong. Rec. S16671 (daily ed. Oct. 5, 1992) (colloquy between Sens. Kerry and Inouye) (emphasis supplied).

<sup>13/</sup>At Cablevision, for instance, a vice president for security, a former FBI agent, directs a field staff of approximately 65 employees and up to 50 independent private investigators to investigate and prosecute signal theft. Individuals found to be engaging in theft-of-service often become paying customers. By contrast, signal piracy is pervasive among users of home satellite dishes. See Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 6 FCC Rcd. 3312, 3318 (1991) (finding that between 50 percent and 60 percent of all home satellite dish owners obtain programming illegally).

retailers, that do not undertake similar responsibilities, will only produce a windfall for those distributors, a number of whom are owned by vertically-integrated cable operators/programming vendors.<sup>14/</sup>

A programming vendor's prices may also vary significantly depending upon the relative efficiencies of each multichannel video programming distributor. Sales of programming to a single multiple system operator, for instance, permit a programming vendor to reach far more subscribers through one transaction than a single contract with a HSD retailer who may have only a fraction of the number of customers. The price that a vendor charges a distributor is a function of both the distributor's penetration in the market it serves and the number of the distributor's subscribers who actually take the service ("service penetration"). A service penetration of fifty percent on a cable system with seventy percent penetration is more valuable to a programming distributor than a service penetration of one hundred percent where the distributor has only a ten percent penetration

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<sup>14/</sup>Since a finding of discriminatory pricing must be based on a finding that *consumers* have been denied access to programming, see Notice at ¶ 10, it is the consumer who should be made whole. That could be accomplished by requiring a distributor to pass through to subscribers any cost savings from a Commission-ordered reduction in the price for programming. Cf., e.g., Memorandum Opinion and Order, 3 FCC Rcd. 263, 265-66 (1987) (requiring AT&T to pass through reductions in local exchange access rates). Such a reduction is impractical, if not impossible, however, since subscriber rates charged by multichannel distributors other than cable systems are not regulated. In the absence of an effective pass-through mechanism, subscribers are unlikely to realize any tangible benefit from the program access provisions.

(i.e.,  $.5 \times .7 > 1 \times .1$ ). The distributor with seventy percent penetration can and does demand a better rate from the programming vendor than the distributor with lower penetration.<sup>15/</sup>

As commercial-free programming services solely dependent upon per-subscriber fees from distributors, Rainbow's American Movie Classics and Bravo may place a higher value than other programming vendors on distribution by cable operators, who offer access to far more households at a relatively low transaction cost compared with other multichannel distributors. Absent evidence that a programming vendor is using differential pricing to deny a particular distributor access to programming, the Commission should presume that the negotiated prices between a vendor and its various distributors reflect the relative "direct and legitimate economic benefits reasonably attributable to the number of subscribers" served by each distributor.<sup>16/</sup>

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<sup>15/</sup>Given the low penetration of HSD retailers as a proportion of total homes to which satellite-delivered programming is available, the volume of programming sales in the HSD market is lower even than the sales volume associated with per channel offerings on cable systems. The rates charged to HSD retailers reflect its vastly lower penetration.

<sup>16/</sup>See 47 U.S.C. § 548(c)(2)(B)(iii). Even as to a given distributor, such as a cable operator, program vendors frequently offer volume discounts reflecting increased subscribership and to encourage the distributor to increase penetration. Rainbow has also offered volume discounts to other multichannel video programming distributors, including HSD retailers. Of course, smaller distributors may not have the subscriber base to qualify for the deepest volume discounts. The Commission should clarify that the program access provisions do not require a programming vendor to give "most favored nation" treatment to every distributor.

**C.    The Commission Should Broadly Construe the Statutory Authority of Programming Vendors to Impose Requirements for the "Offering of Service"**

A programming vendor's statutory authority to impose requirements for the "offering of service"<sup>17/</sup> should be construed broadly to permit the vendor to ensure that a distributor makes an appropriate commitment to the marketing and distribution of the programming service.<sup>18/</sup> With many programming services competing for the attention of subscribers, a programming vendor has a significant stake in ensuring that the distributor makes a systematic and sustained marketing effort on behalf of the vendor's programming service.

Because a cable system is *statutorily* obligated to offer service throughout its franchised area and to comply with customer service standards,<sup>19/</sup> while other distributors do not bear similar obligations and have historically not attained the kind of penetration that cable has, a programming vendor has a legitimate interest in assuring *contractually* that those other distributors agree to undertake certain responsibilities with respect to marketing and service quality to maximize the

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<sup>17/</sup>47 U.S.C. § 548(c)(2)(B)(i).

<sup>18/</sup>Cf. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977) (noting the value of distribution requirements to induce distributors to market new or established products).

<sup>19/</sup>See 47 U.S.C. § 541(a)(3) (requiring franchising authorities to assure that "access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides"); 47 U.S.C. § 552(b) (requiring the Commission to establish customer service standards).

distribution of its services.<sup>20/</sup> The Rainbow programming vendors encourage active marketing of their services by requiring MMDS and SMATV operators to meet minimum subscriber penetration levels over time.<sup>21/</sup> As an incentive to meet those penetration levels, the operators must compensate the programming vendors as if they had done so.

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<sup>20/</sup>The Commission also requests comment on several standards derived from other contexts that it might apply to distinguish justifiable price differentials from discriminatory prices. See Notice at ¶¶ 19-24. Each of the proposed options suffers from significant disadvantages. (Under Section 202, for instance, the Commission can evaluate discrimination by reference to tariffs offering published rates and terms of service. In the programming distribution market, by comparison, the price and terms of distribution are negotiated in an open market and often vary from contract to contract.)

The more appropriate course would be to rely on case-by-case adjudication to give form to the basic structure provided in the 1992 Cable Act. Such an approach permits the Commission to determine the occurrence of discriminatory conduct based on the precise circumstances involved. It would, moreover, be far less disruptive for the industry to conform to an emerging standard than to seek to anticipate the actual consequence of a model standard adopted in this proceeding. The Commission would be better able to gauge the import of its decisions under a case-by-case approach, since parties to a complaint proceeding are likely to place the disputed price or practice in the context of the industry norm.

<sup>21/</sup>An ample subscriber base is important not only to commercial-free programming dependent upon the per-subscriber fee paid by the distributor, but also to vendors of advertiser-supported programming whose advertising sales rise or fall with the number of subscribers taking service from the distributor.

**D.    The Commission Should Adopt a "But For" Test To Determine Whether A Cable Operator Has Exerted "Undue Influence" Over An Affiliated Programming Vendor**

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The statute proscribes only "undue" influence by a cable operator on the decisions of an affiliated programming vendor,<sup>22/</sup> suggesting the use of a "but for" test to implement this particular provision. To support a finding of undue influence the Commission should require proof that, but for the influence of the affiliated cable operator, the programming vendor would not have engaged in the same distribution practice. If a programming vendor's distribution practices can be attributed to factors unrelated to the affiliated cable operator's equity interest, no "undue" influence can be said to have occurred. Even where an affiliated cable operator may have influenced the programming vendor, that influence is irrelevant if the vendor would have reached the same decision based on other considerations. The complainant must bear the burden of proving that the relationship between a cable operator and an affiliated programming vendor gives rise to "undue" influence.

**II.   The Commission's Attribution Rules Should Be No More Restrictive Than Necessary to Prevent "Undue Influence" or Discrimination**

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While the Commission appears inclined to apply the broadcast attribution rules to the program access context,<sup>23/</sup> those rules are more restrictive than necessary to accomplish the purposes of

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<sup>22/</sup>47 U.S.C. § 548(c)(2)(A).

<sup>23/</sup>Notice at ¶ 9.

the program access provisions. A cable operator's ownership of a program vendor should be deemed "non-attributable" in the context of program access if the cable operator lacks the incentive or ability to engage in the "unfair or deceptive" acts or practices addressed by the statute, or if a non-cable operator or operators hold a significant ownership interest in the programming vendor.

As an initial matter, the rules should attribute an ownership interest in a programming vendor only in those markets where the affiliated cable operator owns a cable system.<sup>24/</sup> The program access provisions are intended to prevent discriminatory denials of access, and a cable affiliate of a programming vendor would gain no benefit from denying access to non-cable distributors in those markets in which its affiliated cable operator is not present.

As a more general matter, the broadcast attribution standards are of little relevance to the goals underlying the program access provisions of the 1992 Cable Act. Those standards define the interests that are "cognizable" for purposes of applying the mass media multiple ownership rule to specific situations.<sup>25/</sup> The multiple ownership rules, in turn, are

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<sup>24/</sup>See id. at ¶ 11. Thus, Rainbow's regional sports services offered solely in markets without Cablevision-owned systems would be completely exempted from those provisions. The sale of Rainbow's national programming services to multichannel video programming distributors in markets in which Cablevision does not own cable systems would likewise not be subject to the program access provisions of the Act.

<sup>25/</sup>Attribution of Ownership Interests, MM Docket No. 83-46, 48 Fed. Reg. 10082, ¶ 1 (Mar. 10, 1983).

intended to promote the diversification of media ownership in order to promote the availability of a diversity of viewpoints.<sup>26/</sup>

The purpose of the recently-enacted program access provisions, by contrast, is to increase "diversity in the video programming market"<sup>27/</sup> by barring cable operators from unduly influencing the availability of programming to other multichannel video programming distributors. The program access provisions do not seek to increase the diversity of ownership of programming vendors.<sup>28/</sup> For purposes of those provisions, a cable operator should not be held to have an "attributable" interest in a programming vendor if the operator's interest would not create a significant risk of the kind of "unfair or deceptive acts or practices" that the statute seeks to prevent.<sup>29/</sup> The

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<sup>26/</sup>See Amendment of Multiple Ownership Rules, 18 FCC 288, 291-92 (1953); Second Report and Order in Docket 18110, 50 FCC 2d 1046, 1051 (1974), recon. denied, 53 FCC 2d 589 (1975), remanded on other grounds, National Citizens Committee for Broadcasting v. FCC, 555 F.2d 938 (D.C. Cir. 1977), aff'd., 436 U.S. 775 (1978).

<sup>27/</sup>47 U.S.C. § 548(a).

<sup>28/</sup>Cf. 47 U.S.C. § 533(f)(1)(B) (Commission must prescribe limitations on the number of channels that can be occupied by a programmer in which a cable operator has an attributable interest, rather than limiting an operator's ownership interest in a programmers); 47 U.S.C. § 533(f)(1)(C) (Commission need only "consider the necessity and appropriateness" of limitations on the degree to which multichannel video programming distributors may engage in the creation or production of video programming).

<sup>29/</sup>47 U.S.C. § 548(b) (barring a cable operator from engaging in acts or practices, "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming").

restrictive broadcast attribution rules are unnecessary to prevent such acts or practices.

For the foregoing reasons, a cable operator's interest in a programming vendor should be non-cognizable where there are extrinsic checks on the operator's ability to engage in unfair acts or practices. If, for instance, the operator serves fewer than ten percent of all cable subscribers nationwide and an unaffiliated non-cable operator holds at least a twenty percent ownership interest in the vendor, the operator's primary incentive as a programmer would be to seek additional outlets for its product rather than to limit distribution.<sup>30/</sup> With a significant partner whose economic interest lies in maximizing distribution of the programming, an operator that attempted to inhibit the sale of programming would run the risk of breaching its fiduciary responsibilities. The operator would also remain subject to the antitrust laws with respect to its program sales practices.<sup>31/</sup> Under these circumstances, additional program access requirements would be unnecessary and contrary to the

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<sup>30/</sup>Subsidiaries of the National Broadcasting Company are general partners with Rainbow in the partnerships that own and operate American Movie Classics, Bravo, and the SportsChannel services. NBC's interests in these partnerships range from twenty-five to fifty percent ownership. As a general partner, NBC participates in all major decisions affecting the partnerships, including budget approval; borrowings; capital contributions and distributions; approval of major rights and license agreements; and, in certain instances, the approval of affiliate rates.

<sup>31/</sup>See 1992 Cable Act, § 27 (noting that nothing in the 1992 Act "shall be construed to alter or restrict in any matter the applicability of any Federal or State antitrust law").

purposes of the 1992 Cable Act to "rely on the marketplace, to the maximum extent feasible," to achieve the availability of a diversity of information.<sup>32/</sup>

Other situations in which a cable operator has little incentive or ability to engage in anticompetitive conduct should also be excluded from the reach of the program access provisions. Thus, a cable operator should be deemed not to hold an attributable interest in the vendor of programming services carried by multichannel video programming distributors that serve fewer than one-third of all households in the geographic area in which service is available. The operator would derive little benefit from restricting the distribution of a service with such low penetration.<sup>33/</sup>

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<sup>32/</sup>Id. at § 2(b)(1)-(2).

<sup>33/</sup>If a programming vendor (even one in which an operator holds an attributable interest) wishes to bolster sales of such programming by offering it on an exclusive basis, it should be permitted to do so. The grant of exclusive rights for low-penetration services (*i.e.*, carried by multichannel programming distributors serving fewer than one-third of all households in the relevant geographic area), like exclusives offered in connection with new services, would encourage carriage and thereby foster "program diversity." The Commission should by rule deem such contracts to meet the public interest test of Section 628(c)(4). Cf. Notice at ¶ 36 (proposing that exclusive contracts for new services be deemed in the public interest).

As a separate matter, Rainbow urges the Commission to sanction exclusivity for new services for a period of up to five years rather than two. It often takes more than two years for a new service to become profitable, and during the critical period of early growth exclusive contracts may be the most effective means of ensuring widespread carriage of the service.

### **III. The Program Access Provisions, As Implemented By the Commission, Can Only Operate Prospectively**

As the Commission properly concludes, the program access provisions of the Act must operate prospectively.<sup>34/</sup> Under well-settled canons of statutory construction, a statute will not be construed to apply retroactively absent clear statutory language requiring that result.<sup>35/</sup> Moreover, a statutory grant of rulemaking authority does not include the power to promulgate retroactive rules unless such power is expressly conveyed.<sup>36/</sup> Because the Act does not address the application of the program access requirements to existing contracts,<sup>37/</sup> the Commission may only apply those requirements prospectively.<sup>38/</sup>

It would also be inappropriate for the Commission to establish a deadline by which existing agreements must be renegotiated.<sup>39/</sup> While such an approach may, as a practical matter, hasten the implementation of the program access

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<sup>34/</sup>Notice at ¶ 27.

<sup>35/</sup>E.g., Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) ("[r]etroactivity is not favored in the law. . . . Thus congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result").

<sup>36/</sup>Id.

<sup>37/</sup>By comparison, the retroactive application of the 1992 Cable Act's restrictions on exclusive distribution contracts is explicit. See 47 U.S.C. § 548(h).

<sup>38/</sup>Notice at ¶ 27. The practical inability to ensure that the benefits of any price reductions will inure to the benefit of subscribers, see note 14 supra, further militates against applying the program access provisions to existing contracts.

<sup>39/</sup>See Notice at ¶ 27.

provisions, there is no legal basis on which to justify such an approach.<sup>40/</sup> In addition, because the program access provisions can only apply to future programming contracts, it is evident that a complainant may not base a claim of discriminatory access on an existing contract.<sup>41/</sup> Any other result would require the Commission to disregard the terms of the statute, and could impose a substantial burden on programming vendors to renegotiate distribution agreements, disrupting the distribution market.

**IV. The Commission's Enforcement Procedures Should Permit  
Summary Disposition of Complaints That Obviously Lack Merit**

To avoid unnecessary expenditure of private and Commission resources, the Commission should adopt adjudicatory procedures under which a hearing is generally not conducted and pleadings are limited in number and scope. A complainant should be required to establish both prongs of the statutory test,<sup>42/</sup> and a programmer should be able to rebut a *prima facie* case based on documentary evidence alone.

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<sup>40/</sup>Moreover, applying the Act only to future contracts will not necessarily result in a substantially delay in the implementation of those provisions. Rainbow's distribution contracts, for example, are typically for periods of two to five years.

<sup>41/</sup>See Notice at ¶ 27.

<sup>42/</sup>In addition to the penetration showing proposed by the Commission, see Notice at ¶ 43, a complainant alleging price discrimination by a vertically-integrated programming vendor could also be required to show that non-integrated vendors do not utilize comparable price differentials.

Absent extraordinary circumstances, a complainant should not be able to engage in discovery to establish its *prima facie* case. Instead, discovery should be limited to evidence necessary to meet the complainant's burden of persuasion and evidence to rebut the complainant's *prima facie* case. Moreover, to protect the public release of confidential and proprietary information, the complainant should be obligated to demonstrate the need for evidence claimed by a programming vendor to be confidential or proprietary.<sup>43/</sup>

With regard to appropriate remedies, the Commission should exercise its authority to establish prices, terms, and conditions of sale of programming only under compelling circumstances. Because distribution agreements often vary from contract to contract, what is subsequently found to constitute discrimination often will not reflect any discriminatory animus.<sup>44/</sup> Absent evidence of bad faith or a history of violations of the Act, the Commission should ordinarily remand the matter to the parties for renegotiation rather than expend the significant administrative resources that would be necessary for the agency to establish new terms.

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<sup>43/</sup>See 47 C.F.R. §§ 0.457, 0.461.

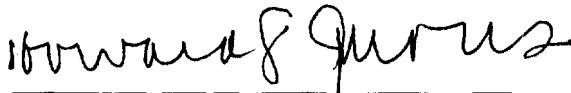
<sup>44/</sup>For the same reason, the Commission should calculate any damage award from the date a complaint is filed rather than from the date a practice subsequently found to be discriminatory is first adopted.

### Conclusion

For the foregoing reasons, the Commission should not intervene in the programming distribution market except to the extent necessary to assure that the public has access to video programming. The Commission should adopt the two-prong test proposed in the Notice. Attribution standards should be tailored to reflect the intent underlying the program access provisions. Those provisions should be applied prospectively, and enforced through the use of procedures that permit expeditious resolution of complaints without the expenditure of substantial private and public resources.

Respectfully submitted,

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